

**Hampton Water Works Co.**

**v.**

**Town of Stratham**

**Docket No.: 17468-97LC**

**PRELIMINARY DECISION**

The "Taxpayer" appeals, pursuant to RSA 79-A:10, the "Town's" October 21, 1997 land-use-change tax (LUCT) of \$8,500 on an 11.5-acre lot (the "Property") based on an \$85,000, full-value assessment. The LUCT was assessed against the fee owner, Peabody Revocable Trust, who assigned its appeal rights to the owner of the easement, Hampton Water Works Co., the Taxpayer. The Taxpayer has the burden of showing the assessment was erroneous or excessive. See TAX 205.07. We find the Taxpayer carried this burden. For the reasons stated below, the board finds .19 acre is disqualified from current use and remands the appeal to the Town for the determination of the RSA 79-A:7, I valuation.

The Taxpayer argued the LUCT assessment was excessive or erroneous because:

(1) RSA 79-A:7 is clear that a tax is levied only when there is a change in use to a non-qualifying use; the installation of sub-surface well together with the appurtenant equipment does not constitute a change in use;

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- (2) the current use board rules, CUB 303.05, explicitly exempt the installation of water lines and other utilities as an event triggering a LUCT;
- (3) Hampton Water Works is a public utility which could have taken the land by eminent domain; when land in current use is taken by eminent domain, a LUCT is not assessed; and
- (4) if the board finds the construction of a well and appurtenant equipment does trigger a LUCT, only the area on which an actual physical change has taken place (39' X 50') is subject to the LUCT.

The Town argued the LUCT assessment was proper because:

- (1) Hampton Water Works paid \$83,000 for the easement, leaving an estimated \$2,000 for the residual land value;
- (2) there was construction activity causing physical changes to the Property which disqualifies the land from current use;
- (3) the former farm use has changed to activities of a commercial public water distribution utility; and
- (4) CUB 303.05 does not apply; the purpose of this rule was to allow property to qualify for current use despite the existence of utility lines.

### **Board's Rulings**

Based on the evidence, the board finds the Taxpayer's installation of a gravel-packed well, supporting plumbing and electrical facilities, control boxes and access road disqualifies from current use the land those items actually occupy. However, the board finds no LUCT should be assessed for the undisturbed land within the 400-foot protective radius around the well. Page 3

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Consequently, the board finds the area that has changed in use to be the 1,850 square feet around

the well and control boxes and the 6,324 square feet encompassed by the 12 foot by 527 foot drive accessing the well. These two areas total 8,174 square feet or approximately .19 of an acre.

RSA 79-A:7 IV and CUB 307.01 address when an LUCT shall be assessed. The pertinent part of RSA 79-A:7 IV reads:

For purposes of this section land use shall be considered changed and the land use change tax shall become payable when:

(a) Actual construction begins on the site causing physical changes in the earth, such as building a road to serve existing or planned residential, commercial, industrial, or institutional buildings; or installation of sewer, water, electrical or other utilities or services to serve existing or planned residential, commercial, industrial, institutional or commercial buildings; or excavating or grading the site for present or future construction of buildings; or any other act consistent with the construction of buildings on the site; except that roads for agricultural, recreational, watershed or forestry purposes are exempt.

**Cub 307.01 WHEN IS LAND CHANGED.** Land under current use classification shall be considered changed and the use change tax imposed, in accordance with RSA 79-A:7, V, when a physical change, which is contrary to the requirements of the category under which the land is classified, takes place as follows:

(a) When the parcel of land is sold or transferred to another owner and no longer meets the minimum acreage requirements as described in the category in which the land is classified, that land shall be considered changed and the use change tax assessed;

(1) The use change tax shall not be imposed at the time of the sale if:

a. The parcel of land is less than the minimum acreage, but is contiguous to and has identical ownership as the land owned by the purchaser; and

b. The purchaser advises the local assessing officials, in writing within 60 days from the date of the sale, of an intent to file for current use on the entire tract;

(2) If the purchaser in (b), above, does not file a form A-10, as provided in Cub 302.01, on or before the next April 15, the use change tax shall be imposed as of the date on which the sale or change in use occurred;

(b) When development occurs which changes the physical condition of the land so as to disqualify it from open space assessment; or

(c) In the case of a development which includes land identified in the development plan to satisfy the density requirement of RSA 79-A:7, V(b), that land shall remain in current use until such time as there is no longer 10 qualifying acres of developable land, as shown on the approved development plan.

Based on the plain reading of RSA 79-A:7 IV (a) and Cub 307.01 (b), the board finds the construction activity related to the installation of the well, control boxes and facilities, underground piping and access road caused “physical changes in the earth” and thus, disqualifies the land from current use. The development of a commercial well and supporting facilities is not a land use that qualifies under the definitions in RSA 79-A:2. See specifically, RSA 79-A:2 VI “Farm land”; VII “Forest land”; IX “Open space land”; and XIII “Unproductive land.” Because the Taxpayer’s use of the land for a commercial well is contrary to the requirements of any current-use category, the land is changed to a nonqualifying use and a LUCT must be imposed. Further, the board finds the list of activities contained in RSA 79-A:7 IV (a) after the phrase “such as” is meant to be illustrative but not limiting as to the activities that trigger a LUCT. Thus, the mere fact the Taxpayer’s type of development is not listed does not preclude

the assessment of a LUCT if the activity causes a change in the “physical condition of the land

so as to disqualify it from open space assessment.”

The board also finds Cub 303.05 pertains to distribution facilities of utilities as they cross current-use land which is not the situation here. The well, support facilities and road comprise the dominant use of the disqualified area not an incidental use.

The board does not agree with the Taxpayer’s argument that the access road to the well is exempt as an agricultural road pursuant to RSA 79-A:7 IV (a). The twelve-foot wide gravel and paved driveway was specifically put in to access the well as noted on the Taxpayer’s site plan (Taxpayer Exhibit G). While this road may be incidently used for accessing the adjacent agricultural field, its predominant purpose is to service the well area.

The Taxpayer also argued that it makes no sense to assess a LUCT for land that could have been taken by the Taxpayer pursuant to its eminent domain authority. The Taxpayer noted RSA 79-A:7 VI (a) excludes land taken by eminent domain from having a LUCT invoked. The board rules this statute does not apply in this instance because the Taxpayer’s acquisition of an easement was a voluntary one and not by eminent domain. The statute is very specific that land “taken by eminent domain or any other type of governmental taking” would be exempt from a LUCT. If the legislature had intended this exemption from a LUCT to apply to voluntary transfers, it could have crafted RSA 79-A:7 VI (a) differently.

The board also reviewed whether RSA 79-A:7 V (b) would apply in this instance.

**RSA 79-A:7 V** ...[O]nly the number of acres on which an actual physical change has taken place shall become subject to the land use change tax, and land not physically changed shall remain under current use assessment except as follows:...

(b) When land, though not physically changed, is used in the satisfaction of density, setback, or other local, state or federal requirements as part of a contiguous development site, such land shall be considered changed in use at the time the development site is changed in use.

While indeed the 400-foot protective radius around the well could be viewed similar to a setback requirement under zoning, the board finds this statute also does not apply in this instance. The wording of 79-A:7 V (b) appears aimed at addressing land associated with a common scheme of development that, while not physically changed, is necessary to meet certain police power requirements such as those contained in Dana Patterson Inc. v. Town of Merrimack, 130 N.H. 353 (1988). The board finds the 400-foot protective radius around the well is more akin to acceptable exclusion of frontage and lot dimensional requirements as provided in CUB 301.04 and CUB 303.01 and .02 .

**Cub 303.01 FRONTAGE.** Land which qualifies for current use assessment shall not be excluded because of road or water frontage.

**Cub 303.02 BUILDING LOT.**

(a) A building lot shall consist of the curtilage of the building or buildings;

(b) The dimensions of the building lot, for the purposes of current use assessment, shall not be governed by local municipal ordinances, planning board requirements, or local zoning ordinances.

(c) Sections of land divided by a building lot shall be considered contiguous, if, when combined, they meet the acreage requirement of Cub 304.01.

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**Cub 301.04 “CURTILAGE”** for the purposes of this chapter means the land upon which a structure stands and the land immediately surrounding the structure, including the following:

- (a) A yard contiguous to the structure;
- (b) Land groomed and maintained around the structure; and
- (c) Land necessary to the support and service of the structure.

The Town argued that the Taxpayer never raised the alternative valuation issue with the Town or, on appeal, with this board until it filed its memorandum with the board on June 10, 1999, and thus, this issue is not ripe for the board to decide because the Taxpayer has not exhausted its administrative remedies at the municipal level. The board agrees. Therefore, because the board finds the Town's determination of the disqualified land area is incorrect, the board remands the appeal to the Town to make a valuation determination on the .19 acres that no longer qualifies for current use. The Town shall make its value estimate within 30 days from the date on this preliminary decision notifying the Taxpayer and copying the board. The Taxpayer shall have an additional 30 days from receipt of the value estimate to notify the Town and the board whether it agrees with the revised value estimate. If the Taxpayer agrees with the Town's new estimate, it shall notify the board and the Town, and the board shall incorporate that value estimate in a final decision. If the Taxpayer does not agree with the Town's revised value estimate, the board shall hold a hearing for the parties to present their valuation arguments. Ultimately, the board will issue a final decision with a RSA 79-A:7 I assessment and include instructions for the Town to correct the recordation of the acreage released from current use. Either party wishing to appeal the board's decision on either its legal or valuation findings, should do so from the board's final decision and not this preliminary decision.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Michele E. LeBrun, Member

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Douglas S. Ricard, Member

**Certification**

I hereby certify that a copy of the foregoing decision has this date been mailed, postage prepaid, to Timothy E. Britain, Esq., Counsel for Hampton Water Works Co., Taxpayer; John J. Ryan, Esq., Counsel for the Town of Stratham; and Chairman, Selectmen of Stratham.

Date: June 28, 1999

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Lynn M. Wheeler, Clerk

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